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No. _____

In The

Supreme Court of the United States

October Term, 1995

STATE OF IDAHO,

Petitioner,

vs.

GENE FRANCIS STUART,

Respondent.

Petition For Writ Of Certiorari To The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the State failed to preserve information of unknown evidentiary value, does *Brady v. Maryland*, 373 U.S. 83 (1963), and succeeding cases allow for a "proximate cause" analysis to be coupled with the "spoliation of evidence doctrine" to direct an "inference" as to the exculpatory nature of, the specific knowledge and the "favorable" nature of the unpreserved information?

2. Under *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), can there be a presumption of "materiality" for failure to preserve information of unknown evidentiary value?

3. Under *California v. Trombetta*, 467 U.S. 479 (1984), can there be an "inference" of bad faith so as to eliminate the requisite showing of actual knowledge of the exculpatory value of lost evidence?

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PETITION FOR WRIT OF CERTIORARI

The State of Idaho petitions for a writ of certiorari to review the decision of the Supreme Court of Idaho which, on review of a petition for postconviction relief, directed the trial court to apply an "inference" of bad faith for nondisclosure of nonmaterial evidence because such nondisclosure was the "proximate cause" of destruction of phone logs of unknown value.

OPINION BELOW

The opinion of the Idaho Supreme Court is reported as *Stuart v. State of Idaho*, 907 P.2d 783 (1995), *rehrg. denied*, 1996. A copy of this opinion is attached as an appendix to this petition.

JURISDICTION

The opinion of the Supreme Court of Idaho was filed February 21, 1995. The State's petition for rehearing was denied January 8, 1996.

The State of Idaho invokes the jurisdiction conferred on this Court by 28 U.S.C. § 1257.

STATEMENT OF THE CASE

PROCEDURAL AND FACTUAL BACKGROUND

Gene Francis Stuart (Stuart) was convicted of murder by torture for the beating death of a three year old boy,

the son of a live-in girlfriend. Stuart was sentenced to death. The Idaho Supreme Court affirmed the conviction and sentence, *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985).

Issues raised by Stuart in his direct appeal and central to consideration of the instant petition are:

(1) Whether the trial court abused its discretion in failing to rule before trial on Stuart's motion *in limine* to exclude possible evidence from Stuart's former wives and girlfriends concerning Stuart's brutalization of them as not being relevant to a showing whether Stuart inflicted torture on the three year old to satisfy Stuart's sadistic inclinations rather than for discipline of the child.

The Idaho Supreme Court found that admission of evidence relative to motive and intent was clearly within the discretion of the trial court. *State v. Stuart*, 110 Idaho 163 at 172.

(2) Proportionality review of the imposition of the death sentence. At sentencing, the trial court considered evidence presented at the preliminary hearing and trial in addition to the presentence report:

> *While not all this information was available as evidence for the jury, the information was properly before the sentencing court.* There is evidence that in his domination and abuse of his various victims the defendant committed at least three rapes. . . . On a previous occasion when the defendant learned of his wife's pregnancy, he bound her to the bed and beat her stomach with his fists and forced the handle of a spatula up her vagina in an attempt to abort her pregnancy.

> Another woman testified of the defendant dragging her into a cold lake during the early morning hours of a day in November, where he repeatedly held her head under water, threatening to kill her. The evidence showed that Defendant often choked his victims into submission, including his own son by a former marriage who was choked until the boy lapsed into unconsciousness. Additionally, Defendant sodomized and forced oral sex upon his son.
>
> The record before the sentencing court discloses a defendant with three prior convictions, one for rape, and a ten-year history of seemingly endless incidents of beatings, chokings, assaults, rapes and tortures, some at the point of a gun or knife, inflicted upon all of the former wives, girlfriends and children whom the defendant was able to bring within his control. *State v. Stuart*, 110 Idaho 163 at 176 (emphasis added).

Stuart also appealed the district court's denial of his petition for postconviction relief. Stuart had claimed twelve separate grounds for relief. Of significance to the instant petition for certiorari were Stuart's attempts to introduce affidavits to contradict testimony given at trial that Stuart "abused and misused women and children." *Stuart v. State*, 118 Idaho 865, 866, 801 P.2d 1216 (1990). Stuart argued that the affidavits were newly discovered evidence which was not available at trial and created "a material issue of fact which would affect the conviction and/or sentence imposed on him." *Stuart v. State*, 118 Idaho 865 at 869. The Idaho Supreme Court held that the trial court did not err in denying Stuart's claim to entitlement to an evidentiary hearing on the affidavits because the evidence was not newly discovered, could have been

obtained before trial with reasonable diligence and the evidence *would not produce an acquittal or change in sentence*. The Idaho court affirmed the trial court's finding that the affidavits contained evidence "cumulative of evidence at trial and would not have produced an acquittal or a change in sentencing." *Stuart v. State*, 118 Idaho 865 at 872.

On appeal of Stuart's second petition for postconviction relief, the Idaho Supreme Court reversed the trial court's dismissal of the second petition and remanded with instructions to hold an evidentiary hearing. *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990). Stuart had alleged that "confidential attorney-client conversations were monitored and that prosecution used these conversations to gain evidence it otherwise did not have in its possession." *Stuart v. State*, 118 Idaho 932 at 933.

The Idaho Supreme Court concluded that there was a "triable issue of fact as to whether the conduct of the appellant and Mr. Matson established an attorney-client relationship." *Id.* The trial court was instructed to determine whether there was a recording of attorney-client conversations on the part of the sheriff's department and whether Stuart's constitutional rights were violated. "If such attorney-client conversations are found to have been recorded, the State will be required to show that the evidence at trial had an origin independent of the eavesdropping." *Stuart v. State*, 118 Idaho 932 at 935.

On remand, the trial court focused on the limited issues of (a) whether there was any evidence to conclude attorney-client conversations were recorded and if so, (b)

whether information in those conversations was inappropriately obtained.

There was no offer of any testimony by Stuart or his attorney as to the content of any conversations which would elucidate the substance of the issues discussed between Stuart and his attorney, which presumably would have led the State to discover evidence it would not have otherwise developed. The phone logs Stuart contended would establish the recordation of calls were lost or destroyed. The phone logs of Stuart's attorney, Mr. Matson, assuming an attorney-client relationship existed, were also lost or have not otherwise been accounted for.

The trial court found that after Stuart was arrested, Stuart made and received several calls from Mr. Matson, an attorney in Washington who had represented Stuart in the past. Based on Mr. Matson's testimony, the trial court found that an attorney-client relationship existed. The district court found that only one call between Stuart and his sister was tape recorded. The district court found that other calls were "monitored by simply being close enough to Stuart to hear his side of the conversation." *Stuart v. State*, 907 P.2d 783 at 786.

The district court concluded, after conflicting testimony from many witnesses, that it could not make a finding that entries in the jailer's log conclusively established that certain phone conversations between Stuart and unknown persons had been tape recorded. The evidence was inconclusive. The court could not make a finding that telephone conversations or that attorney-client conversations had been taped or monitored. The trial court concluded that the spoliation doctrine did not

apply and that no inference or presumption existed in favor of any party:

> The district court described the missing portions of two logs for the period that Stuart was incarcerated at the Clearwater County Jail as an unsolved mystery. Based on the witnesses' testimony about the journals, the court said that the prisoner telephone log would have shown all calls placed to or from Stuart, and the dispatcher's log or radio log would have shown the activities of the dispatchers during this time period. The critical portions of both of these logs were not produced by the Clearwater County Sheriff's Office. The court described exhibit 192, a bound journal-type book used as a jail phone log book for the years 1981 and 1982. The court found that it was obvious from an examination of the book that the log sheets for the time period prior to November 26, 1982, had been torn or cut from the book. From the evidence, the district court made a finding that the log sheets of the inmate phone log and the dispatcher's log were intentionally removed and for that reason were not available at trial. . . .
>
> The district court ruled that after considering all of the evidence, which included the testimony of numerous other witnesses in addition to those summarized above, it could not find that the removal and/or destruction of the logs was by Clearwater County or its agents. The court pointed out that it seemed unlikely that anyone wishing to hide this portion of the record would have made the removal so obvious by only partially destroying the evidence. The court also found that the logs were accessible to several individuals, including Bryant, Finley,

Geidl, and Page, as well as the present members of the sheriff's staff. The court also doubted that, after Prosecutor Calhoun had informed Sheriff Albers that it was not a good idea to record prisoner telephone conversations, the written records of Clearwater County would have shown that the telephone calls of Stuart were tape recorded. The district court therefore concluded that the spoliation doctrine did not apply and no inference or presumption existed in favor of either party; that a telephone conversation between Stuart and his sister on September 20, 1981, was the only call that was recorded; and that no attorney-client calls of Stuart were monitored. *Stuart v. State*, 907 P.2d 783 at 789-790.

SUMMARY OF ARGUMENT

The Idaho Supreme Court "created" a new federal right to disclosure of information of unknown evidentiary value based on tort principles. This is a dangerous deviation from controlling law. "But for" the nondisclosure of information which is not relevant as to guilt or innocence, other evidence of unknown value *might* have been preserved and as such a defendant's constitutional rights were violated. The State of Idaho imported an inference of "bad faith" destruction of evidence and the State's nondisclosure as the "proximate cause" of the "spoliation of evidence" which *might* have led to the suppression of evidence at trial.

This should not be treated as a State's singular aberration. This decision potentially allows for other courts to

contrive *Brady v. Maryland*, 373 U.S. 83 (1963) violations. The United States Supreme Court needs to use clear, consistent language in defining what constitutes a *Brady* violation. Over time, decisions have developed new ways to explicate the issuing court's discussions. This has created a situation where it is difficult to clearly articulate what *Brady* means in light of *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THERE IS NO "REASONABLE PROBABILITY" UNDER *KYLES v. WHITLEY* THAT HAD THE PHONE LOGS BEEN PRESERVED, STUART WOULD NOT HAVE BEEN CONVICTED FOR THE TORTURE-MURDER OF A THREE YEAR OLD BOY

"Evidence" not disclosed to a defendant must be favorable to the defendant and must be "material" to establish that there is a "reasonable probability" that the result would have been different. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995). This decision came out after the State had moved for its petition for rehearing but prior to the Idaho Supreme Court's summary denial of the State's petition.

There is nothing in the record from which to conclude that any "favorable" evidence was withheld from Stuart. The State of Idaho unsuccessfully argued that *United States v. Bagley*, 473 U.S. 667 (1985), was the correct test to apply on remand to the nondisclosure of the phone logs. The State argued that Stuart had the burden to show that there was "favorable evidence" withheld from him;

that this favorable evidence was "material;" that constitutional error resulted from its "suppression" by the government; and that Stuart had to show that there was a "reasonable probability" that had the evidence been disclosed to the defense, the result of the proceeding would have been different. The correctness of the State's advocacy of the application four-part analysis of *Bagley* is reiterated by this Court's recent pronouncement in *Kyles v. Whitley*.

Contrary to *Kyles v. Whitley*, the Idaho Supreme Court focused on a single piece of missing "evidence," the phone logs, and inferred bad faith in its disappearance. They reached this conclusion through the application of tort principles to establish "causation" and ignored the cumulative effect of all other evidence as to the guilt of Stuart.

II.

THE NONDISCLOSURE OF NONMATERIAL EVIDENCE CANNOT CREATE AN "INFERENCE" OF BAD FAITH AND THEREFORE A PRESUMPTION OF A *BRADY* VIOLATION AS TO EVIDENCE WHICH IS OF UNKNOWN EVIDENTIARY VALUE

The Idaho Supreme Court contradicted its own ruling from 1985 when it held:

> [T]he "exculpatory value" of the destroyed evidence is, concededly, indirect in this case. The evidence at issue, *assuming* it would have showed, or would have helped to establish, the taping or monitoring of attorney-client phone calls, *would not have directly refuted the evidence of Stuart's sadistic predisposition*. Rather, it would

> *potentially* have led to suppression of evidence of Stuart's prior relationships that was introduced at trial on this issue. Because suppression of the evidence would have assisted Stuart's defense even more than traditional exculpatory evidence used for impeachment or refutation, we believe that in the unique context of this case, exculpatory value has therefore been established. *Stuart v. State*, 907 P.2d 783 at 793, f.7 (emphasis added).

This is the same evidence with regard to motive and intent that a previous differently constituted court held was wholly within the trial court's discretion to admit.

The Idaho Supreme Court further compounded its illogical application of case law when it concluded that even though:

> the prosecution did not conceal the existence of the phone logs, it did conceal the existence of the tape recording of Stuart's phone call to his sister which, if disclosed, would have inevitably led to further discovery regarding the sheriff's surreptitious tape recording sufficient to preserve the phone log. We believe that the failure to provide discovery regarding the taped phone calls is a sufficiently proximate cause of the destruction of the phone log evidence so as to rise to the level of bad faith under *Youngblood*. (Citation omitted.) *State v. Stuart*, 907 P.2d 783 at 793.

Brady v. Maryland and its line of cases do not allow an inference of bad faith for nondisclosure of information of unknown value.

The missing phone logs simply do not fall within a *Brady* evidence classification. Stuart's *Brady* claim is purely speculative.

This is not a situation where favorable eyewitness statements which might have exonerated Stuart were withheld, or the withholding of the fact of the recapitulation of an informant with self-preservation on his mind, or the failure to produce physical evidence which would exonerate the defendant. The State did not introduce any testimony it knew or should have known was perjured. *See United States v. Agurs*, 427 U.S. 97, 103-04. The State did not fail to respond or voluntarily fail to disclose any exculpatory evidence. *Id.* at 104-07. The phone logs are simply not exculpatory.

Stuart received a fair trial and the nondisclosure of phone logs does not "undermine the confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. The content of the phone logs has no bearing on Stuart's guilt or innocence.

III.

THE IDAHO SUPREME COURT DECISION IS A DISTORTION OF *ARIZONA v. YOUNGBLOOD* AND *CALIFORNIA v. TROMBETTA*

Arizona v. Youngblood, 488 U.S. 51 (1988), requires an actual showing of the bad faith destruction of evidence which could exonerate the defendant. The Idaho Supreme Court's application of *Arizona v. Youngblood* eliminates the burden of showing a police officer's bad faith destruction of evidence which would *exonerate* the defendant and eliminates the burden of establishing that the police had

actual knowledge of the exculpatory nature of the information prior to the time it was destroyed.

The negligent or unexplained destruction of phone logs which could *not* form the basis for exonerating Stuart of the brutal beating death of a small child cannot be a logical extension of *Arizona v. Youngblood*. The State of Idaho made no use of the phone logs in its case-in-chief. The State of Idaho made no use of the single recorded conversation between Stuart and his sister because the content of that conversation was absolutely irrelevant to the issue of guilt or innocence. The Idaho court's reliance on inferences of bad faith, piggybacked with inferences of exonerating evidence, is not supportable by any extension of *California v. Trombetta*, 467 U.S. 479 (1984).

> Under the Due Process Clause of the Fourteenth Amendment, the Supreme Court has developed "what might be loosely called the area of constitutionally guaranteed access to evidence" (citations omitted). The Court has specified that, to the extent the Constitution imposes a duty on the government to preserve evidence, "that duty must be limited to evidence which might be expected to play a significant role in the suspect's defense" – i.e., evidence that is constitutionally material (citation omitted), to be constitutionally material, evidence must: (1) "possess an exculpatory value that was apparent [to the police] before the evidence was destroyed," and (2) "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means" (citation omitted). The near possibility that lost or destroyed evidence could have

> exculpated the defendant is not sufficient to satisfy *Trombetta*'s requirement that the exculpatory value be "apparent" to the police before destruction (citation omitted). Additionally, "if the exculpatory value of the evidence is indeterminate and all that can be confirmed is that the evidence was "potentially useful" for the defense, then a defendant must show that the government acted in bad faith in destroying the evidence. (citation omitted.) Mere negligence on the government's part in failing to preserve such evidence is inadequate for a showing of bad faith (citation omitted). *U.S. v. Parker*, 73 F.3d 48 (5th Cir. 1996).

As in the *Parker* matter above, Stuart was not made to demonstrate bad faith on the part of the State in the alleged destruction of evidence because the exculpatory value of the missing phone logs is "indeterminate" and is "potentially useful" at best. *Youngblood, supra*, 488 U.S. at 58.

Similarly, as discussed in the *Parker* matter, in the context of missing videotaped evidence, "even if one assumed that the videotaped evidence might have been exculpatory in the instant case, defendants have not demonstrated that the videotaped evidence is 'of such a nature' that the defendant would be unable to obtain comparable evidence by other reasonably available means as required by *Trombetta*," 467 U.S. at 489. This is especially significant given that the Idaho Supreme Court recognized that Stuart's counsel had his own phone records which presumably would be consonant with the State's phone logs with regard to when phone calls between attorney and client were made. The Idaho

Supreme Court simply "created" a new constitutional right borne of negligence, proximate cause and lack of deference to the trial court's conclusions regarding credibility of witnesses' testimony and evidence.

The trial court clearly acted within its discretion in declining to infer that evidence would have been unfavorable or favorable to either party. The trial court made no finding that the phone logs had been willfully destroyed.

The nondislosure made no difference between conviction or acquittal. Nondisclosure cannot be elevated to a due process violation.

IV.

THE *BRADY v. MARYLAND* LINE OF CASES DOES NOT SUPPORT THE IMPOSITION OF THE SPOLIATION OF EVIDENCE DOCTRINE IN THE ABSENCE OF PROOF

The Idaho Supreme Court phrased the issue for purposes of establishing a constitutional violation as follows: "Whether the non-disclosure of non-material evidence has significance under the controlling standard for establishing a constitutional violation based on the destruction of evidence of unknown value." *Stuart v. State,* 907 P.2d 783 at 791.

The court reasoned that "because of the unknown value of the evidence at issue in this case, we apply *Youngblood* and restrict our inquiry to the existence of governmental bad faith." *Stuart v. State,* 907 P.2d 783 at 793.

The Idaho Supreme Court concluded that *Youngblood* "is a clear recognition that concealment is one method of proving exculpatory value of evidence known to the government prior to its destruction." *Id.* The court acknowledged that the State did not conceal the existence of the phone logs. The court summarily concluded that the State "concealed" the existence of the tape-recording of Stuart's phone call to his sister which, if disclosed, would have inevitably led to discovery regarding the sheriff's surreptitious tape-recording sufficient to preserve the phone logs.

Youngblood cannot be extended for the proposition that bad faith can be reached through an attenuated proximate cause analysis.

Without the conclusion of "proximate causation" begetting "bad faith," the "spoliation of evidence doctrine" could not be applied against the State for a *Youngblood* due process violation.

The use of a presumption or inference of "bad faith" is compounded further through the misapplication of the holding in *United States v. Cooper*. In *Cooper*, government agents were repeatedly told that certain evidence was potentially exculpatory at the time it was destroyed. *Cooper* required a defendant to meet the burden of proof to show the government's knowledge of the exculpatory nature of evidence which is eventually destroyed *and* to show there must be no alternative means to support an assertion of innocence because of this destruction, before any conclusion can be drawn about good or bad faith. *Cooper* at 930.

> *Youngblood's* bad faith requirement dovetails with the first part of the *Trombetta* test: that the exculpatory value of the evidence be apparent before its destruction (citation omitted). The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed (citation omitted). *Cooper,* at 931.

Remarkably, the Idaho Supreme Court cited *United States v. Cooper* for its proximate cause analysis which would give rise to an inference of bad faith absent any showing of the exculpatory nature of the logs or the government's knowledge of that exculpatory value. *Stuart v. State,* 907 P.2d at 793.

V.

THE IDAHO SUPREME COURT REFUSED TO FOLLOW SUPREME COURT AND FEDERAL COURT AUTHORITY

Two cases, *Kyles v. Whitley,* 115 S. Ct. 1555 (1995), and *United States v. Gonzales,* 907 F.Supp. 785 (Dist. Delaware 1995), were not addressed by the Idaho Supreme Court in rejecting the State's petition for rehearing.

These cases stand for the proposition that actual knowledge of the favorable or exculpatory nature of evidence *prior* to its destruction is a touchstone requirement. *Gonzales* elaborates on the requirement that a defendant prove the elements of specific intent to destroy exculpatory evidence:

> Defendant's burden to prove a denial of due process arising out of the government's failure

> to preserve potentially useful evidence is two-fold. First, Defendant must prove that the exculpatory value of the item destroyed was apparent before its destruction, and was of such a nature that Defendant would be unable to obtain comparable evidence from other reasonably available means. (Citation omitted.) Second, Defendant must prove that the government's failure to preserve evidence constitutes bad faith. (Citation omitted.) These burdens are interrelated: bad faith is proved by showing that the evidence has exculpatory value apparent to the police, but was nonetheless destroyed. (Citation omitted.) *Gonzales* at 792-793.

The *Gonzales* court concluded that absent a defendant's showing the exculpatory nature of missing items of evidence, "the court cannot determine the prejudice to the defendant by their loss." *Id.* at 794.

The Idaho Supreme Court conjectured and inferred, without any affirmative showing, that there was bad faith and intentional destruction of exculpatory evidence and directed the district court to apply the spoliation of evidence doctrine against the State.

CONCLUSION

The petition for certiorari should be granted and this court should vacate the judgment of the Idaho Supreme Court, either summarily or after rehearing. The *Brady v. Maryland* line of cases should not be the subject of a

"proximate cause" or an "inference" to determine whether a constitutional violation occurred.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. No. 20060

GENE FRANCIS STUART,	**1995 Opinion No. 22**
Petitioner-Appellant,	**Boise, January 1994 Term**
v.	**Filed: February 21, 1995**
STATE OF IDAHO,	**Frederick C. Lyon, Clerk**
Respondent.	

Appeal from the District Court of the Second Judicial District, State of Idaho, Clearwater County. Hon. Ron Schilling, District Judge.

Appeal from denial of petition for post conviction relief. *Reversed and remanded.*

Robert E. Kinney, Orofino, for appellant.

Hon. Larry EchoHawk, Attorney General, and Lynn E. Thomas, Deputy Attorney General, Boise, for respondent. Lynn E. Thomas argued.

BISTLINE, J.[1]

This is an appeal by Gene Francis Stuart (Stuart) from the denial of his second petition for post conviction relief in which he alleged that his telephone calls from the

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[1] Justice Bistline authored this opinion prior to his retirement on December 1, 1994.

Clearwater County Jail to his attorney(s) had been impermissibly monitored or taped. After an evidentiary hearing, the district court denied Stuart's petition, concluding that Stuart had failed to carry his burden of proof. Because we hold that there is not substantial and competent evidence to support the district court's finding that the intentional destruction of portions of the relevant telephone logs was not attributable to the state, such that a spoliation inference should be applied in Stuart's favor, we reverse.

PRIOR PROCEEDINGS

In 1982, Stuart was convicted of First Degree Murder By Torture for the beating death of a three-year-old child, Robert Miller. Stuart was sentenced to death. The conviction and sentence were upheld on direct review in *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985).

Stuart's first petition for post-conviction relief was denied by the district court and this Court affirmed the denial (in a subsequently withdrawn opinion). The Court denied Stuart's petition for rehearing and issued a substituted opinion in *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990).

Stuart then filed this second petition for post-conviction relief, alleging that the Clearwater County Sheriff's Department had intruded upon his confidential conversations by taping and/or monitoring his attorney-client phone calls. The district court summarily dismissed Stuart's second petition. On appeal, this Court reversed and remanded, holding that summary judgment on the second petition was inappropriate because there were

disputed issues of material fact. *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990). We requested that the district court determine: (1) whether there was recording of attorney-client conversations by the Sheriff's department; and (2) whether Stuart's constitutional rights were violated. The Court stated that if the district court found that Stuart's attorney-client conversations had been recorded, the State must show that the evidence at trial had an origin independent of the eavesdropping. *Stuart*, 118 Idaho at 935, 801 P.2d at 1286.

THE DISTRICT COURT'S RULING

In conducting the proceedings on remand, the district court bifurcated the inquiries that this Court ordered. The district court directed the parties to first present evidence relevant to the question of whether any of Stuart's phone calls to or from his attorney(s) were monitored or tape recorded, indicating that the question of whether Stuart's constitutional rights had been violated would only be reached if Stuart satisfied his initial burden of proving that recording or monitoring of these calls had occurred. Because the district court ultimately concluded that Stuart had not satisfied his burden of proof, the evidence presented was limited to the threshold question of whether or not taping or monitoring of attorney-client communications had occurred.

In remanding the case to the district court, we held "that there is a triable issue of fact as to whether the conduct of [Stuart] and Mr. Matson [an attorney in Washington who had represented Stuart in past] established an attorney-client relationship." The district court began its

analysis with that question and found that in fact an attorney-client relationship existed during the period immediately after Stuart was arrested on September 19, 1991. On the basis of Matson's testimony, the district court found that during that time, Stuart made and received several calls from Matson. The district court found that Stuart discussed the death of Robert Miller and the issue of sadistic pre-disposition as an element of the murder by torture charge the stater was filing against Stuart. Matson expressed concern that the state would attempt to contact two women with whom Stuart had past relationships, Teresa Jacobsen and Vicki Owens. Stuart told Matson that although he knew where they were, the state would not be able to locate them. The state did ultimately locate these two women and they subsequently testified against Stuart at trial. On appeal, neither party takes issue with the district court's findings relevant to the existence or scope of the attorney-client relationship or attorney-client communications between Stuart and Matson.

Stuart called many witnesses in an attempt to establish that his attorney-client telephone calls had been either monitored or tape recorded. The state called many witnesses to rebut that assertion. Most of the witnesses for both sides were employees, or former employees, of the Clearwater County Sheriff's Office.

Evidence was adduced during the proceeding concerning a concealed microphone in a false thermostat in one of the rooms of the Clearwater County Sheriff's Department. However, the district court found that the hidden microphone behind the thermostat in the interview room was not installed or in place during the time

that Gene Francis Stuart was a prisoner in the Clearwater County Jail.

The district court found that it was undisputed that one of Stuart's telephone calls, made or received by him while housed in the Clearwater County Jail, was tape recorded. The recorded conversation was between Stuart and his sister.

Emery Ray Norton testified that he did radio work for the sheriff's office and set up the equipment for this recorded call. Norton testified that, pursuant to Sheriff Albers' request, he connected one of the telephone lines with a tape recorder. Norton further testified that he disconnected this system on that same evening and never reinstalled it.

Sheriff Albers testified that, for a period of time, some of Stuart's outgoing calls (he estimated three) were monitored. Albers believed that only he and Deputy Robert Harrelson monitored these calls. On the basis of Albers' testimony, the district court found that the calls were monitored by simply being close enough to Stuart to hear his side of the conversation.[2] Albers believed that all of these calls involved conversations between Stuart and his family members. According to Albers, no attorney-client calls were to be monitored.

Albers testified that he had ordered one incoming call of Stuart's to be recorded. Albers testified that, at the time Stuart was arrested, the sheriff's office did not have the capability of recording telephone conversations until

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[2] *But see*, footnote 5, *infra*.

Norton connected the phone line to a tape recorder. Albers specifically testified that no conversation between Stuart and Matson was monitored or recorded.

Albers testified that no further telephone calls of Stuart were recorded, apparently based, to some extent, upon a conversation with the Clearwater County Prosecutor, Stephen Calhoun, who advised that such a practice could cause problems. Albers testified that the purpose for recording the telephone conversation of Stuart and of monitoring some of Stuart's calls was security, to protect Stuart from the public and to prevent an escape by Stuart.

Calhoun, who prosecuted Stuart, testified that Albers had informed him of the tape recorded call. His impression was that the tape recording had been made on the day that he was informed or perhaps the night before. Albers indicated to Calhoun that the purpose of the recording and monitoring was for security and discussed a pistol missing from the Stuart residence.[3] Calhoun's opinion expressed to Albers was that he did not want to interfere with security, but felt that Albers should not be monitoring or recording conversations and believed that

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[3] The district court found that it was established during the hearing that the discovery of a missing pistol would not have been until September 21, 1981. The missing pistol, therefore, could not have been a justification for recording the telephone conversation on September 20, 1981. The district court concluded, however, that it could have been a reason argued by Albers for continuing to thereafter monitor or record the petitioner's conversations.

no such activity took place after this conversation. Calhoun testified that he had no knowledge of any attorney-client conversations having been monitored or recorded.

Arven E. Finley, a deputy for the Clearwater County Sheriff's office until his resignation in 1987, testified that he had knowledge of recordings made of Stuart's telephone calls. However, the district court found his direct knowledge was very limited. The district court pointed out that certain individuals, such as Finley, who testified at this evidentiary hearing and gave affidavits supportive of Stuart's Petition for Post-Conviction Relief, had positions somewhat antagonistic to the Clearwater County Sheriff's Office and specifically to Sheriff Albers. The district court explained that Deputy Finley was a candidate for Clearwater County Sheriff in 1988 opposing Sheriff Albers.

Finley testified that he had heard one recorded conversation, evidently the conversation between Stuart and his sister. He further testified that on one occasion, he was present in the Clearwater County Sheriff's Office when a dispatcher told him that Stuart was on the phone and that all of his conversations were being recorded. Finley testified that he did not recall who the dispatcher was, but he did recall that the jailer was Curtis Berry (an assertion that the district court pointed out was contradicted by the testimony of Curtis Berry). The district court found that other than these occasions, Finley's information admittedly came from what others had told him.

John E. Bryant was another witness called by Stuart who the district court found had a poor relationship with

the Clearwater County Sheriff's Office. Bryant was displeased when Deputy Geidl was fired, subsequently quit himself, and brought a lawsuit against Clearwater County over a dispute in wages. The district court found that Bryant's testimony regarding the recording of Stuart's telephone calls was based entirely upon hearsay and speculation. Bryant testified that it was "common knowledge" among the sheriff's staff that all of Stuart's telephone calls were to be recorded. He testified that this started a few days after Stuart's arrest, which the district court found contradicted the testimony of another witness. Bryant further testified that he had never personally participated in the recording of any of Stuart's telephone calls and believed that these recordings were for security reasons and would not include attorney-client conversations.

Gary Geidl, another witness called by Stuart, was employed as a deputy sheriff on Forest Service patrol during the time Stuart was incarcerated at Clearwater County. He left the Clearwater County Sheriff's Office on bad terms, sued the county for back wages, and also ran against Sheriff Albers in a subsequent election. The district court found that his testimony and, prior to that, his affidavit in support of Stuart's petition, were based almost entirely upon hearsay and speculation. He did testify to having personal knowledge as to one recording of a conversation which he believed was recorded in the visitor's room rather than the interview room or by telephone. Geidl testified that he was told by a dispatcher (whose name he did not remember) that it was a conversation involving Stuart, and that he assumes the conversation was between Stuart and an attorney or a minister

because the door to the visitor's room was closed. The district court found that there was no other testimony or evidence supporting recordings of Stuart being made from the visitor's room. Geidl also testified about recordings being made from a microphone hidden behind the thermostat in the interview room but the district court concluded, as stated above, that this microphone was installed after the time Stuart was incarcerated in Clearwater County.

Geidl had no personal knowledge of any capability to record prisoner telephone calls. He had no personal knowledge of any policy to record prisoner telephone calls.

Rosanne Page, another witness called by Stuart, testified that she had direct knowledge of recordings being made of telephone calls between Stuart and his attorney Mr. Kinney. Page was employed as a dispatcher from December 1, 1981, through November, 1987. She testified that, a few months after she started her employment, she was instructed by someone in authority that all of Stuart's incoming and outgoing telephone calls were to be recorded. She testified specifically that she had recorded telephone calls between Stuart and his attorneys and related one incident where Mr. Kinney, Stuart's attorney, had called, she had put him through, and then had activated the recording equipment. She testified that she had never listened to any of these conversations and had no personal knowledge of their content.

The district court found there were several factors which adversely affected the weight to be given this testimony and the credibility of Page. In November, 1987,

Page was fired by Sheriff Albers and then allowed to resign. She was angry about this and about the termination of Geidl (whom she lives with). Page testified that she was present during a confrontation about the taping between Georgia Berry, a former dispatcher, and Sheriff Albers. However, Berry testified that Page was not present for that confrontation. The district court concluded that a reasonable inference was that much of Page's testimony is based on what others have told her and not what she actually observed. Additionally, the district court pointed out that Page's testimony differed from that of another witness in several aspects. Finally, Page's testimony during her deposition was much less certain than her testimony in court.

Randall Everitt, an investigator from the Attorney General's Office, was assigned to investigate the allegations of the Second and Subsequent Petition for Post-Conviction Relief. He traveled to Orofino in the fall of 1988 on two occasions where he interviewed witnesses, examined documents, and made a written report. He testified that there was only the one recorded conversation made by the Clearwater County Sheriff's Office involving the petitioner, the conversation between Stuart and his sister.

The district court was disturbed by two entries, both made by jailer Curtis Berry, in the jailer's log which the district court felt were difficult to explain satisfactorily. The first entry was for the date of 10-27-81 in the 1600-2400 shift where jailer Berry made an entry which read exactly as follows:

> 2055-2105 Stuart made 3 phone 2 incomp. calls -Taped- Back to Cell 15.

Curtis Berry had difficulty explaining this entry to the district court's satisfaction. He had no specific recollection of why he had printed the word "taped." His opinion was that this must have meant that he was placing masking tape around an area of the jail to be painted.

In another log, on the date of 11-06-81, time 2115, Berry made the following entry (apparently regarding an inmate named Couie):

> 2115 incoming call for couie taped as per 2001, . . .

It was established that "2001" was the identifying number for Sheriff Albers. Berry reasoned that this entry again concerned his taping off an area to protect it from painting to be done, and that he was doing this per Sheriff Albers' instruction. The district court found that Berry's testimony may or may not have been accurate.

After listening to all of the testimony in this case the district court said it could not find one way or the other with regard to the journal entries. The court ruled that it may be that these very suspicious entries actually were for taping areas to be painted. There was testimony from both sides regarding the painting activities or lack thereof at or about the time these entries were made. However, while the district court was suspicious of those entries, based upon all the evidence in this case, the court felt it could not make a finding that these entries referred to the taping of telephone conversations or the taping or monitoring of attorney-client conversations.

The district court described the missing portions of two logs for the period that Stuart was incarcerated at the Clearwater County Jail as an unsolved mystery. Based on the witnesses' testimony about the journals, the court said that the prisoner telephone log would have shown all calls placed to or from Stuart, and the dispatcher's log or radio log would have shown the activities of the dispatchers during this time period. The critical portions of both of these logs were not produced by the Clearwater County Sheriff's Office. The court described exhibit 192, a bound journal-type book used as a jail phone log book for the years 1981 and 1982. The court found that it was obvious from an examination of the book that the log sheets for the time period prior to November 26, 1982, had been torn or cut from the book. From the evidence, the district court made a finding that the log sheets of the inmate phone log and the dispatcher's log were intentionally removed and for that reason were not available at trial.

Gene Fish, the jail administrator at the time of Everitt's investigation, testified that these portions of the logs were definitely missing at the time he gave the logs to Everitt for the Attorney General's Office investigation. The district court found that it was probable that the missing portions were taken some time between 1982 and the fall of 1988 when they were turned over to Everitt for inspection.

The district court ruled that after considering all of the evidence, which included the testimony of numerous other witnesses in addition to those summarized above, it could not find that the removal and/or destruction of the logs was by Clearwater County or its agents. The court

pointed out that it seemed unlikely that anyone wishing to hide this portion of the record would have made the removal so obvious by only partially destroying the evidence. The court also found that the logs were accessible to several individuals, including Bryant, Finley, Geidl, and Page, as well as the present members of the sheriff's staff. The court also doubted that, after Prosecutor Calhoun had informed Sheriff Albers that it was not a good idea to record prisoner telephone conversations, the written records of Clearwater County would have shown that the telephone calls of Stuart were tape recorded.

The district court therefore concluded that the spoliation doctrine did not apply and no inference or presumption existed in favor of either party; that a telephone conversation between Stuart and his sister on September 20, 1981, was the only call that was recorded; and that no attorney-client calls of Stuart were monitored.

Stuart appeals, arguing (1) that he did establish that attorney-client phone calls were tape recorded or monitored; (2) that he was entitled to a favorable spoliation inference based on the missing evidence; and (3) that his due process rights were violated by the state's failure, before the original trial, to disclose the tape-recording of his September 20, 1981, phone conversation with his sister.

ANALYSIS

I. Standard Of Review

A petition for post conviction relief is a civil proceeding governed by the Idaho Rules of Civil Procedure.

Paradis v. State, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986). As the petitioner, Stuart has the burden of proving by a preponderance of the evidence that his assertions are correct. I.C.R. 57(c). Credibility of witnesses and weight of testimony are matters resolved by the trial court as trier of fact and will not be set aside on appeal unless clearly erroneous. I.R.C.P. 52(a). A factual finding is clearly erroneous only if it is not supported by "substantial and competent evidence in the record." *Pace v. Hymas*, 111 Idaho 581, 589, 726 P.2d 693, 701 (1986).

II. The District Court's Finding That The Intentional Destruction Of Portions Of The Telephone Logs Was Not Attributable To The Sheriff's Office Is Clearly Erroneous

The district court found that, for the period of time prior to November 26, 1982, the missing pages from the jail phone log book for 1981 and 1982, exhibit 192, as well as the dispatch radio log covering that time period, were intentionally removed. The district court found that the pages of the jail phone log had been deliberately torn or cut from the jail phone log book and that, had they not been destroyed, the missing pages would have documented Stuart's telephone activity for the relevant time period. Similarly, the district court found that the missing dispatch log would have shown the activities of the dispatchers during the relevant time period.

The district court discounted the testimony of Randall Everitt of the Attorney General's Office that the logs were intact in 1988 and instead relied on the testimony of Gene Fish, the former jail administrator, that the missing

portions were definitely missing when Fish gave Everitt the logs in the fall of 1988. The district court thus concluded it was "probable" that the missing portions were taken between 1982 and the fall of 1988.

As stated above, the district court found that Stuart had not established that the state or its agents removed or destroyed the missing log entries because of three factors: (1) that it was unlikely anyone wishing to hide this portion of the logs would make the removal so obvious by only partially destroying the evidence; (2) that it was unlikely anyone in the sheriff's office would have made a written entry documenting the taping of phone calls after the prosecutor had told the sheriff it was a bad idea to record prisoner phone calls; and (3) "[t]he logs were accessible to several individuals, including Bryant, Finley, Geidl and Page, as well as the present members of the sheriff's staff."[4]

We will review these conclusions in sequence. The first conclusion is a speculation that is not supported by substantial and competent evidence because there is no evidence in the record that anyone outside of the sheriff's office, such as the former employees, had any reason to destroy the evidence in such an obvious manner either. Although there is evidence in the record that Geidl sued

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[4] We interpret the district court's reference to the present members of the sheriff's staff as a comparative reference only because any destruction by an employee of the sheriff's office would clearly be chargeable to the state. Similarly, any destruction of the evidence by Finley, Page, Geidl, or Bryant while they were still employed by the sheriff would be conduct attributable to the state.

for back wages and later ran for the office of sheriff, there is no explanation of why the theft or destruction of the evidence at issue in such an obvious manner did, or would have, assisted him in either endeavor (or why Rosanne Page, with whom Geidl lives, would have done this on his behalf). Likewise, there is no explanation in the record of why Arvin Finley, as a candidate for sheriff, or John Bryant, suing for back wages, would have stolen or destroyed the evidence in this manner. At best, any inference that can be properly drawn from the method of destruction is neutral, establishing nothing more than an inartful saboteur.

The second finding, a finding of the presumed contents of the missing evidence, also cuts both ways. If the missing pages contained no evidence damaging to the sheriff's office, then the only motivation that the former employees would have had for destroying them assumes they had a sophisticated understanding of the spoliation doctrine and the adverse inferences that might subsequently be drawn against the sheriff's office by its inability to produce evidence within its control. There is no evidence in the record to support such a conclusion. Moreover, the district court's conclusion that nobody in the sheriff's office would have made a written entry of tape recording activity after the sheriff was advised against such taping on September 21, 1981, is at odds with the district court's own "suspicions" regarding Berry's October 27, 1981, entries in the jailer's log which used the word "taped."[5]

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[5] As the district court correctly noted, it is the invasion of the attorney-client relationship which is pivotal to Stuart's

The third finding is the most critical. The district court's indication that, in addition to the "present members of the sheriff's staff" who had access to the records now missing, Bryant, Finley, Geidl and Page also had access to the records is not supported by substantial and competent evidence. The evidence that former employees of the sheriff's office had access to records came primarily from the testimony of Sheriff Albers. Sheriff Albers testified that the missing telephone message pad and radio logs would have been kept in the downstairs vault, unless temporarily moved to a file cabinet. He also testified that the phone log from which pages had been torn, exhibit 192, would likely have been kept in a drawer adjacent to the jailer's desk in the booking area. Other

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claim, whether it be by tape-recording or secret monitoring. Although there is testimonial support in the record for the district court's finding that monitoring occurred by various staff members standing near inmates while they talked on the telephone, the finding is partially incorrect because Sheriff Albers testified that the "monitoring" was accomplished by picking up an extension phone and listening. See Tr. p. 1581, liens 7-12; p. 1582, lines 2-7; Tr. p. 1585, lines 7-11.

The district court's findings regarding the monitoring were also contradictory. In the same paragraph the district court found that "Sheriff Albers testified that, for a period of time, some of the outgoing calls of Stuart (he estimated three) were monitored" and "Albers knew of no outgoing calls from Stuart that were monitored."

Thus, the district court's speculation about the low likelihood that any entry in the destroyed journals would have been favorable to Stuart was based on a factual finding that was only partially correct because it ignores the possibility that the journals would have been useful in establishing telephone extension monitoring activities in addition to recording activities.

witnesses corroborated this portion of Albers' testimony. Sheriff Albers opined that any former employee who remembered the combination to the vault could have stolen the records. Similarly, he speculated that any person could have torn the pages from the phone log by removing it from the desk at a time when no staff member was present.

There is simply no evidence in the record that Bryant, Finley, Geidl, or Page were ever in the sheriff's office after termination of their employment or that they enjoyed greater access than any other member of the general public. There is no evidence that any of these employees retained keys to the premises. As discussed above, there is no evidence of a rational motive for any of these former employees to have stolen or destroyed the records. Therefore, because the district court found that the phone records were intentionally destroyed and the record on appeal establishes that the phone records were in the exclusive control and possession of the sheriff's office at the time this took place, the district court's finding that the destruction was not attributable to the sheriff's office must be set aside as clearly erroneous. The next step in our analysis is a determination of the constitutional significance of this erroneous factual finding.

III. Even If The Intentional Destruction Of The Telephone Logs Was Not Directly Attributable To The State, Because It Would Not Have Occurred But For The State's Discovery Violation, Stuart's Rights To Due Process Were Violated

As stated above, the district court found that it was undisputed that a single incoming phone call to Stuart

from his sister was tape recorded on September 20, 1981. On appeal, it is agreed that, although the prosecution was aware of the existence of that tape recording at the time Stuart moved for discovery on September 21, 1982, the prosecution did not disclose the existence of the tape recording as ordered in the discovery order entered on September 30, 1982. *See* Appellant's Brief at 10; Respondent's Brief at 19.[6]

The state argues on appeal that this failure to disclose evidence ought to be evaluated under the standard of *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985). *Bagley* refined the standard of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and held that a constitutional violation for failure to disclose material evidence requires a showing of "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383.

The tape-recorded conversation between Stuart and his sister was primarily a discussion of jail visitation rules, whether to inform Stuart's mother of his arrest, and the fact that Robert Miller had died and the police were searching for implements Stuart had used to punish the boy. Thus, applying the *Bagley* standard to the undisclosed tape recording of the phone call between Stuart and his sister, it is clear that the result of Stuart's trial

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[6] Although the state takes the position that this disclosure was not required by the rules of discovery, that argument ignores the fact that the district court had entered an order requiring production. Accordingly, the state is foreclosed from making that argument at this late date.

would not have been different because none of this discussion would lead to the suppression of evidence obtained by violating Stuart's attorney-client confidences.

However, the circumstances of this case are unique because, but for the nondisclosure of this evidence which was not material, the phone logs, evidence of unknown value, would undoubtedly have been preserved. Therefore, we must proceed to analyze whether the non-disclosure of non-material evidence has significance under the controlling standard for establishing a constitutional violation based on the destruction of evidence of unknown value.

In *Paradis v. State*, 110 Idaho 534, 716 P.2d 1306 (1986), we outlined a three-part test for determining whether "a defendant's due process rights have been violated by the loss or destruction of allegedly exculpatory evidence." *Id.* at 539, 716 P.2d at 1311. The *Paradis* test looks at "(1) whether the evidence was material to the question of guilt or the degree of punishment; (2) whether the defendant was prejudiced by the loss or destruction of the evidence; and (3) whether the government was acting in good faith when it destroyed or lost the evidence." *Id.* In *Paradis* the destroyed evidence at issue was the victim's body which had been cremated. The Court found that the government had not acted in bad faith and that Paradis was not prejudiced by the destruction of the body because a more extensive autopsy showing where the victim was killed was not relevant to Paradis' guilt or innocence. However, since our decision in *Paradis*, the United States Supreme Court has revisited the question of governmental loss or destruction of evidence, specifically with reference to evidence of unknown value.

In *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1988), a sexual assault case in which the failure of the police to test semen samples or refrigerate the victim's semen-stained clothing resulted in the loss of ability to analyze that evidence, the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337. The Court reasoned that

> requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. In attempting to define bad faith, the Court referred back to its earlier decision in *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528 (1984), and reiterated that "the presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 56, n. *, 109 S. Ct. at 366-37 n. *.

In essence, for cases where the destroyed evidence is of unknown value, the Supreme Court's decision in *Youngblood* consolidates the three considerations which were enunciated in *Paradis* through its reasoning that materiality and prejudice to the defense can be presumed

where the government acts in bad faith as that term was defined by the Court in *Trombetta*. Therefore, because of the unknown value of the evidence at issue in this case, we apply *Youngblood* and restrict our inquiry to the existence of governmental bad faith.

Returning to the question of whether or not the prosecution's discovery violation has relevance in the destruction of evidence analysis, we draw guidance from *Youngblood*. In explaining that the government had not acted in bad faith in *Youngblood*, the Court pointed out that none of the spoiled evidence at issue was "concealed" from the defendant. *Id.* This is a clear recognition that concealment is one method of proving that the exculpatory value of the evidence was known to the government prior to its destruction.[7]

In the present case, although the prosecution did not conceal the existence of the phone logs, it did conceal the existence of the tape-recording of Stuart's phone call to his sister which, if disclosed, would have inevitably led to further discovery regarding the sheriff's surreptitious

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[7] The "exculpatory value" of the destroyed evidence is, concededly, indirect in this case. The evidence at issue, assuming it would have showed, or would have helped to establish, the taping or monitoring of attorney-client phone calls, would not directly have refuted the evidence of Stuart's sadistic pre-disposition. Rather, it would potentially have led to suppression of evidence of Stuart's prior relationships that was introduced at trial on this issue. Because suppression of the evidence would have assisted Stuart's defense even more than traditional exculpatory evidence used for impeachment or refutation, we believe that in the unique context of this case, exculpatory value has therefore been established.

tape recording sufficient to preserve the phone logs. We believe that the failure to provide discovery regarding the taped phone call is a sufficiently proximate cause of the destruction of the phone log evidence so as to rise to the level of bad faith under *Youngblood*. *Cf. United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993) (discovery request for evidence by defense put government on notice of exculpatory value of evidence such that subsequent destruction of the evidence constituted bad faith).

As discussed in the previous section, the district court's finding that the intentional destruction of evidence was not attributable to the state was unsupported by substantial and competent evidence. Accordingly, having reversed that finding as clearly erroneous, such determination constitutes an independent and adequate basis apart from the discovery violation for a finding of bad faith under *Youngblood*. We next proceed to analyze the consequences of this constitutional violation.

IV. Because The Intentional Destruction Of The Evidence Is Attributable To The State, Stuart Is Entitled To An Inference That The Destroyed Evidence Would Have Been Favorable To His Petition

The district court in this case acknowledged that if the destruction of evidence was attributable to the state, the spoliation doctrine would apply in Stuart's favor. The spoliation doctrine is a general principle of civil litigation which provides that upon a showing of intentional destruction of evidence by an opposing party, an inference arises that the missing evidence was adverse to the party's position. *See McCormick On Evidence*, 4th Ed.

§ 265, pp. 189-94 (1992). In a criminal case, application of a favorable inference under the spoliation doctrine is the appropriate remedy for a *Youngblood* due process violation. *See State v. Dulaney*, 493 N.W.2d 787, 791-92 (Iowa 1992).

Although we hold that Stuart is entitled to a favorable inference regarding the missing phone logs, we believe that the district court is in the best position to decide what the proper scope of that inference should be, based on the evidence presented. The district court may determine that an inference should be drawn that the logs contained evidence of either recording or monitoring of attorney-client phone calls. On the other hand, the district court may conclude that the proper inference is only that other cryptic entries such as those made by Berry would have been found. In either event, application of an inference necessarily involves the weighing of evidence, a task exclusively reserved to the trial court. Therefore, we remand to the district court for a reweighing of the evidence employing the above-described inference in Stuart's favor.

CONCLUSION

We hold that the district court's conclusion that the destruction of the phone logs is not attributable to the state is clearly erroneous. We also hold that the state's discovery violation operated to conceal the existence of the taping such that the destruction of the phone records is also attributable to the state as a violation of Stuart's right to due process. We therefore remand to the district court with instructions to weight the evidence a second

time giving Stuart the benefit of a favorable inference concerning the destroyed evidence.

Justices JOHNSON and SILAK, and Justice Pro Tem MEEHL **CONCUR**; CHIEF Justice McDEVITT **DISSENTS WITHOUT OPINION.**

(2)

No. 95-1602

Supreme Court, U.S.
FILED
MAY 6 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

STATE OF IDAHO,

Petitioner,

v.

GENE FRANCIS STUART,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The respondent, Gene Francis Stuart, respecfully prays that the Petition for Writ of Certiorari filed by petitioners to review the Opinion of the Supreme Court of the State of Idaho entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decision delivered in the proceedings below except the petition fails to recognize on the first page the above-entitled matter is a capital case.

STATEMENT OF THE CASE

In October of 1982, GENE FRANCIS STUART was convicted of violating § 18-4001 of the Idaho Code. (Murder in the first degree.) The conviction and concomitant death sentence was appealed to the Idaho Supreme Court. *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985), (hereinafter *"Stuart I"*). The State's recapitulation of the facts stated in *Stuart I* in the Petition for Writ of Certiorari is correct only in-so-far as it goes. However, it is incorrect in its glaring absence of the number of issues which were raised in *Stuart I*. Those issues were as follows:

1. Was there sufficient evidence to warrant a jury to convict on a first degree murder by torture charge? *Stuart I*, 110 Idaho at 167, 715 P.2d at 37.

2. Should the jury have been instructed as to the lesser included offense of second degree murder by torture? *Stuart I*, 110 Idaho at 169, 715 P.2d at 39.

3. Was there error in the denial of defendant's/Mr. Stuart's motion in limine seeking to forbid introduction of evidence concerning Stuart's relationships with former wives and girlfriends?

4. Was there error in the venue chosen for trial? *Stuart I*, 110 Idaho at 172, 715 P.2d at 842.

5. Was there error in the fact that defendant/Mr. Stuart was incarcerated for a year prior to a trial and deprived of a speedy trial? *Stuart I*, 110 Idaho at 173, 715 P.2d at 843.

Finally, Stuart raised issues regarding the aggravating circumstances relied upon by the trial court in rendering the death penalty and jury non-participation in the sentencing process. *Stuart I*, 110 Idaho at 174, 715 P.2d at 833.

The State of Idaho in its brief in support of the petition makes much of the proportionality review and quotes the most egregious language available regarding actions allegedly taken by Mr. Stuart. The State's selection of "facts" is extremely ironic because it is exactly those facts which would not be in the State's possession absent the surreptitious tape recording and/or monitoring of attorney-client communications by law enforcement officials at issue.

The statement of facts by the State in reference to the proportionality review are nothing but a thinly disguised

attempt to color consideration of legal issues by attempting to paint Mr. Stuart as a very bad man who deserves to die. The State is fully aware that much of the "proportionality" facts used by the sentencing court were hearsay, were not subject to cross examination, and further were obtained by the State as a result of the surreptitious recording and/or monitoring of conversations between Mr. Stuart and his attorneys. Those facts obviously were used by the trial court as a major consideration in a nonmitigation finding and sentencing Mr. Stuart to death. Many of the same facts gleaned from the testimony of girlfriends was also used by the State to establish intent and/or some sort of sadistic inclination on the part of Mr. Stuart.

The second Stuart case, *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990) (*Stuart II*) was a post-conviction proceeding and involved: 1) issues surrounding the use of a preliminary hearing transcript at sentencing; 2) the fact that the State had offered a plea bargain at one time in which the prosecutor indicated he would not seek the death penalty if Mr. Stuart pleaded guilty, Mr. Stuart was being punished for exercising his right to a jury trial; 3) that there was new evidence indicating Mr. Stuart had discussed with others the problems with disciplining, and had non-violent relationships with children and other women. The trial court denied Mr. Stuart post-conviction relief and the Idaho Supreme Court upheld that denial. *Stuart II*, 118 Idaho at 873, 801 P.2d at 1224.

Of more immediate concern to the issues currently before this Court is *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990) (*Stuart III*). The issue before the Idaho Supreme Court in *Stuart III* was a second post-conviction

petition filed by Mr. Stuart. The second petition alleged that while incarcerated at the Clearwater County Jail awaiting trial, the Clearwater County Sheriff's Department monitored and/or recorded conversations of Mr. Stuart. Those conversations included attorney-client communications which were used by the State to gain evidence not otherwise in its possession. *Stuart III*, 118 Idaho at 933, 801 P.2d at 1284. The *Stuart III* court set forth its factual recitation as follows:

> The appellant was confined in the Clearwater County Jail for twenty-four days before an attorney was appointed to represent him. During this twenty-four day period, the appellant contacted Mr. Matson, an attorney in Seattle who had represented him before. Included in these discussions between the appellant and Mr. Matson, were the names and locations of various witnesses who were later called to testify at trial by the State.

Stuart III, 118 Idaho at 934, 801 P.2d at 1285.

The first issue dealt with in *Stuart III* was whether there could properly be a second petition for post-conviction relief. The Idaho Supreme Court held that under the circumstances (facts unknown at the time of the first petition) the second petition was timely and proper. *Stuart III*, 118 Idaho at 934, 801 P.2d at 1285.

After finding that there was an attorney/client relationship between Mr. Stuart and Mr. Matson, the Idaho Court ruled as follows:

> We begin our analysis by recognizing that an accused has the constitutional right to assistance of counsel. *Gideon v. Wainwright*, 372 U.S.

335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); U.S. Const. amend. VI. This right is fundamental and is not a luxury. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). So fundamental is this right that it has been recognized as the right to *effective* assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1141, 25 L.Ed.2d 763 (1970). This right to effective assistance cannot be disregarded by the states. *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955).

We hold that the monitoring and recording of attorney-client conversations may deny a defendant the constitutional right of effective assistance of counsel, *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019 (1963); the constitutional right to due process, *Coplon v. United States*, 191 F.2d 749 (D.D.C. 1951), *cert. denied*, 342 U.S. 926, 72 S.Ct. 363, 96 L.Ed. 690 (1952). *See also, Berger v. New York*, 338 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). Attorney-client conversations are constitutionally protected and cannot be invaded by the State. *In re Bull* 123 F.Supp. 389 (D.Nev. 1954); *State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019 (1963). A defendant and his attorney must be afforded the opportunity to discuss freely and confidentially.

The affidavits submitted by the State in response to the appellant's petition were insufficient to rebut the allegations of the appellant. There remain material issues of fact concerning the monitoring and recording of the appellant's attorney-client conversations.

Stuart III, 118 Idaho at 934-935, 801 P.2d at 1285-1286.

The ruling of *Stuart III* was a remand to the trial court with instructions to determine if there was recording of attorney-client conversations on the part of the sheriff's department and whether the appellant's constitutional rights were violated. *Stuart III*, 118 Idaho at 935, 801 P.2d at 1286. Particular note should be paid to Justice Bistline's concurring opinion in *Stuart III* wherein he stated in reference to Mr. Stuart's then attorney:

> Thus it came about at trial that Mr. Kinney had to defend Stuart on actual information charges of first degree torture murder, and at the same time defend against the non-charged crimes, including a hospital rape of one of the women witnesses, and an unrelated attempted drowning of another, all because the district judge had ruled this evidence as being necessary to prove torture murder. Now, as Paul Harvey would say, here is the rest of the story. The witnesses who Mr. Kinney could not locate, for perhaps some reason other than his lack of time and funds, and could not adequately prepare against, are now belatedly learned to be – from the mouths of conscientious citizens – the same women the whereabouts of whom had been discussed in wire-tapped conversations between Stuart and an attorney who was advising him from western Washington. The district judge in his sentencing decision said that Stuart had been found by him – just him, and not the jury – to be *guilty beyond a reasonable doubt* of whatever those women testified Stuart had done to them.

Stuart v. State, 118 Idaho at 936, 801 P.2d at 1287 (Bistline J., concurring)

The statement by the State as to the remand issue is inaccurate, (Pet. p. 4 & 5). The instructions to the trial court by the Supreme Court in *Stuart III* were to determine if there was a recording and, if so, were Mr. Stuart's constitutional rights violated, not "whether any information in those conversations was inappropriately obtained" as set forth by the State. It has been established that the State would not have become aware of several of the witnesses used by the State in order to prove Mr. Stuart's alleged intent, as well as aggravating factors in obtaining the death sentence, absent the surripitious recording and/or monitoring. *Stuart III*, 118 Idaho at 936, 801 P.2d at 1287.

Thus, finally the stage was set for the Idaho Supreme Court's opinion in *Stuart v. State*, ___ Idaho ___, 907 P.2d 783 (1995) (*Stuart IV*).

The Idaho Supreme Court in *Stuart IV* spent the majority of the decision summarizing witnesses' testimony regarding first, whether there was monitoring of the calls, then result, if any, of the destruction of certain phone logs and dispatch logs which would have indicated who had called, when the calls occurred and whether calls were "taped." *Stuart IV*, 907 P.2d at 786-789.

There is absolutely no question there is a factual finding in the record that the jail phone log book for 1981 and 1982, as well as the dispatch radio log (2 separate items) were intentionally removed from the jail and/or destroyed. Even the trial court found that pages of the jail phone log had been *deliberately* torn or cut from the jail phone log book, and had they not been destroyed, the missing pages would have documented Mr. Stuart's

phone activity. Similarly the trial court found that the missing dispatch log would have shown the activities of the dispatchers during the relevant time period (e.g. recording or monitoring). This is important because the method of monitoring was both by tape recording as well as standing in close proximity to Mr. Stuart as he was using the phone. *Stuart IV*, 907 P.2d at 790-791.

After reviewing this evidence the Idaho Supreme Court then ruled as follows:

> Therefore, because the district court found that the phone records were intentionally destroyed and the record on appeal establishes that the phone records were in the exclusive control and possession of the sheriff's office at the time this took place, the district court's finding that the destruction was not attributable to the sheriff's office must be set aside as clearly erroneous. The next step in our analysis is a determination of the constitutional significance of this erroneous factual finding. *Stuart IV*, 907 P.2d at 791-792.

The Idaho Supreme Court held that once the finding of the possession and destruction of the evidence was attributable to the State:

> . . . [b]ut for the nondisclosure of this evidence which was not material, the phone logs, evidence of unknown value, would undoubtedly have been preserved. Therefore, we must proceed to analyze whether the non-disclosure of non-material evidence has significance under the controlling standard for establishing a

> constitutional violation based on the destruction of the evidence of unknown value.

Stuart IV, 907 P.2d at 791.

The Idaho Supreme Court then held specifically in cases of destroyed evidence as follows:

> In essence, for cases where the destroyed evidence is of unknown value, the Supreme Court's decision in *Youngblood* consolidates the three considerations which were enunciated in *Paradis* through its reasoning that materiality and prejudice to the defense can be presumed where the government acts in bad faith as that term was defined by the Court in *Trombetta*. Therefore, because of the unknown value of the evidence at issue in this case we apply *Youngblood* and restrict our inquiry to the existence of governmental bad faith.

Stuart IV, 907 P.2d at 792.

The Court then held that the failure to provide discovery regarding the taped phone call is a sufficiently proximate cause of the destruction of the phone log evidence so as to rise to the level of bad faith under *Youngblood*. *Stuart IV*, 907 P.2d at 793.

The Court then found another basis for finding bad faith, independent from the *Youngblood* determination as follows:

> As discussed in the previous section, the district court's finding that the intentional destruction of evidence was not attributable to the state was unsupported by substantial and competent evidence. Accordingly, having reversed that finding as clearly erroneous, *such*

> *determination constitutes an independent and adequate basis apart from the discovery violation for a finding of bad faith under Youngblood.* We next proceed to analyze the consequences of this constitutional violation. (emphasis added)

Stuart IV, 907 P.2d at 793.

The Court concluded by discussion of the spoilation doctrine wherein the showing of intentional destruction of evidence by an opposing party creates an inference that the missing evidence was adverse to the party's position. *Stuart IV,* 907 P.2d at 793-794, and remanded to the trial court to weigh the evidence, giving benefit of favorable inferences concerning the destroyed evidence to Mr. Stuart.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE ISSUES RAISED DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI.

Rule 10 of the Rules of the United States Supreme Court provides for granting a petition for a writ of certiorari only when special and important reasons exist for review. The position espoused by the State fails to satisfy any of the criteria set forth in subsection (a) through (c) of Rule 10. The Idaho Supreme Court's decision in *Stuart IV* is entirely consistent with decisions of the United States Supreme Court as well as Federal Circuit Courts of Appeal.

At best, the State takes the position the Idaho Court made erroneous factual findings or misapplied a properly stated rule of law. This is an insufficient basis for granting review.

Ordinarily, the United States Supreme Court will not grant certiorari merely to review evidence or inferences drawn therefrom. Sup.Ct.R. 10(c); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1950). *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

Thus respondent respectfully requests that the Petition be denied.

II.

THE COURT HAS A DUTY TO SEARCH FOR CONSTITUTIONAL ERROR IN A CAPITAL CASE AND SHOULD NOT SUBSTITUTE SPECULATION FOR THE OPINION OF LOWER COURTS.

The State makes much of the case of *Kyles v. Whitley*, ___ U.S. ___, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The introduction of *Kyles* penned by Justice Souter states:

> Because "[o]ur duty to search for constitutional error with painstaking care is never more exacting that it is in a capital case," *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987),[FN1] we granted certiorari, 511 U.S. ___, 114 S.Ct. 1610, 128 L.Ed.2d 338 (1994), and now reverse.
>
> > The dissent suggests that Burger is not authority for error correction in capital cases, at least when two previous reviewing courts have found no error. Post, at 1576-1577. We explain, infra, at 1569, that

> this is not a case of simple error correction. As for the significance of prior review, Burger cautions that this Court should not "substitute speculation" for the "considered opinions" of two lower courts. 483 U.S., at 785, 107 S.Ct. at 3121. No one could disagree that "speculative" claims do not carry much weight against careful evidentiary review by two prior courts. There is nothing speculative, however, about Kyles's Brady claim.

Kyles, 115 S.Ct. at 1560, n.1.

Both aspects of the above-quoted language arise in the instant case. First, it is a capital case and should require painstaking search for constitutional error, if sought by Mr. Stewart and second this Court should not interfere with the factual findings of a lower court closer in time and proximity to the record and the proceedings below.

III.

THE "REASONABLE PROBABILITY" FINDING UNDER *KYLES V. WHITLEY* IS A FACTUAL FINDING AND SHOULD NOT BE DISTURBED BY GRANTING A PETITION FOR A WRIT OF CERTIORARI.

The State argues that failure to disclose evidence favorable to defendant must be material in order to establish a reasonable probability that the result would have been different. The State argues that *Kyles v. Whitley*, ___ U.S. ___, 115 S.Ct. 1555, 1316 L.Ed.2d 490 (1995), stands for the proposition that "evidence not disclosed" to a defendant must be favorable to the defendant and must be material. Materiality is established by a finding there

is a reasonable probability that the result would have been different.

The State's argument is placing the cart before the horse. The case at bar deals in large part with the intentional destruction of evidence, not a negligent failure to disclose evidence or a judgment call on the part of a prosecutor. The instant case concerns intentional bad faith destruction of evidence by the State to which the Idaho Supreme Court applied the spoilation doctrine and required the trial court make further findings or inferences in favor of Mr. Stuart.

In *Kyles* this Court held:

> The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*. *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Citations omitted)

Kyles v. Whitley, 115 S.Ct., at 1565.

The above-cited language is inapplicable to the case at bar for at least three reasons. First, the holding is "irrespective of good or bad faith" which flies in the face of the first portion of the Idaho Supreme Court's ruling that there was bad faith on the part of the State. Second, application of the spoilation doctrine requires a finding of

materiality (a finding by the Idaho Supreme Court under state law is inappropriate for review by the U.S. Supreme Court). Sup.Ct.R. 10; Third, the Idaho Supreme Court found discovery violations in and of itself required application of the spoilation doctrine. *Stuart IV*, 907 P.2d at 793.

The State wants this Court to believe that the error was one of law when, in fact, there was no error. The State merely doesn't like the factual findings of the Idaho courts. This is made all the more evident in an obvious attempt by the State to color legal analysis with gruesome facts by insertion in bold, capitalized letters that had the phone logs been preserved, Stuart would not have been convicted for the "torture murder of a three-year-old boy."

IV.

THE QUESTION OF MATERIALITY IS A FACTUAL DETERMINATION INAPPROPRIATE FOR THE GRANTING OF A WRIT OF CERTIORARI

Brady v. Maryland stands for the proposition that the evidence maybe "material" to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, L.Ed.2d 215 (1963). *Kyles v. Whitley* requires evidence be material. However, the finding of materiality does not require that Mr. Stuart prove by a *preponderance* the disclosure of the suppressed evidence would result in an acquittal or a different sentence, but only that there is a *reasonable probability* of a different result. In citing *Bagley*, the *Kyles* court stated as follows:

> *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 115 S.Ct. at 1566.

Again, in the instant case the findings of the Idaho courts on materiality are factual. The State is not arguing the Idaho Supreme Court misstated the law. The state is arguing a misapplication of facts to properly stated law. Mr. Stuart, however, argues a proper application. Regardless, the result is the same. The petition should be denied.

The holding of the Idaho Supreme Court in *Stuart IV*, contrary to allegations by the State, was not that a *single* piece of missing evidence was material, but that the missing evidence (which in fact was two items – the jail logs and the dispatch logs) would have led to favorable evidence and/or led the State to evidence which it would not otherwise have (Pet. p. 9). The *Stuart III* Court's instruction to the trial court was to make a favorable inference to Mr. Stuart but left to the trial court the determination as to the appropriate weight, thus the effect of that determination has yet been made. Thus the State invites this Court to embark upon a review of facts

not only found, but yet to be found, by a State lower court.

V.

DUE TO THE INTENTIONAL DESTRUCTION OF EVIDENCE IT IS IMPOSSIBLE TO DETERMINE THE MATERIALITY OF EVIDENCE.

The State claims that missing phone logs are in and of themselves the evidence. (Pet. p. 9). The logs or the conversations in and of themselves that were recorded or listened to are not the problem. It is evidence that was gleaned as a result of the surreptitious monitoring of phone conversations and/or personal conversations between Mr. Stuart and his attorneys that is the problem. The State failed to address that issue in its petition.

The State had the logs in its possession. Without question the dispatch logs and jail log were intentionally destroyed by the State, which in turn leads to an inference that those logs contained evidence favorable to Mr. Stuart. The "effect" of that favorable inference has yet to be made and cannot be assumed by this court.

Again, there were two grounds found by the *Stuart IV* court for sending this matter back to the trial court. The first was for a discovery violation which apparently is not at issue in this matter since it is not raised by the State. The second is the finding of *Youngblood* bad faith.

VI.

THE STATE ERRONEOUSLY CLAIMS THAT THE IDAHO COURT FAILED TO PROPERLY APPLY *ARIZONA V. YOUNGBLOOD* AND *CALIFORNIA V. TROMBETTA*.

The holding of *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 337, 102 L.Ed. at 281 (1988), requires a showing of bad faith on the part of the police in the context of a failure to preserve potentially useful evidence:

> We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Arizona v. Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337, 102 L.Ed.2d at ___.

The Idaho Supreme Court has made a factual finding of bad faith. Therefore the failure to preserve potentially useful evidence does constitute a denial of due process of law particularly when that failure is the result of an intentional destruction of that evidence. This is not a situation where the entire phone log was destroyed as a part of a general or usual course of operations. This is a situation where specific pages covering the times that Mr. Stuart was incarcerated were torn from books and destroyed while these books were in the possession of the sheriff's office. These documents also apparently were not destroyed *until* the issue of the surreptitious monitoring of attorney-client communications was discovered. Therefore, the Idaho Supreme Court made the finding the destruction was in bad faith and applied the spoilation doctrine which simply required a ruling that a favorable inference to Mr. Stuart be made and a direction to the

trial court to determine what weight to give that inference. *Stuart IV*, 907 P.2 at 794.

Once again, the State is inviting this Court to embark upon a long and torturous review of determinations and evidence factual, one better left to the courts more closely associated with those facts. The State fails to make the distinction between the logs and the evidence obtained as a result of the monitored conversations. (Pet. p. 15) The logs in a vacuum mean absolutely nothing. The logs were evidence of who Mr. Stuart was talking to, when he was talking to them, and whether, in fact, those conversations had been monitored. The State had that information in its possession and that very specific information was destroyed by the State. There was no proximate causation argument or finding required to reach the bad faith conclusion.

VII.

THE IDAHO COURT PROPERLY STATED THE LAW AND PROPERLY APPLIED FACTS TO THAT LAW.

The State makes much of the alleged failure of the Idaho Supreme Court to deal with a district court opinion from the United States District Court of Delaware. (Pet. p. 16) In *United States v. Gonzalez*, 907 F.Supp. 785, 792 (D. Del. 1995) the court stated as follows:

> Defendant's burden to prove a denial of due process arising out of the government's failure to preserve potentially useful evidence is two-fold. First, defendant must prove that the exculpatory value of the item destroyed was apparent before its destruction, and was of such a nature

that defendant would be unable to obtain comparable evidence from other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984). Second, defendant must prove that the government's failure to preserve evidence constitutes bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988) (failure to refrigerate clothing and perform certain tests on fluids found thereon was deemed to be at worst negligent, and did not demonstrate the requisite mental state necessary to make out a due process claim). These burdens are interrelated: bad faith is proved by showing that the evidence had exculpatory value apparent to the police, but was nonetheless destroyed. See *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993).

The holding in *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993) stated as follows:

> Two Supreme Court cases set out the test we apply to determine when the government's failure to preserve evidence rises to the level of a due process violation. In *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984), the Court held that the government violates the defendant's right to due process if the unavailable evidence possessed "exculpatory value that was apparent before the evidence was destroyed, and [is] of such nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." In *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988), the Court added the additional requirement that the defendant demonstrate that the police acted

> in bad faith in failing to preserve the potentially useful evidence. See also Paradis 954 F.2d at 1488 (explaining Trombetta and Youngblood test).
>
> Youngblood's bad faith requirement dovetails with the first part of the Trombetta test: that the exculpatory value of the evidence be apparent before its destruction. *Trombetta*, 467 U.S. at 489, 104 S.Ct. at 2534. The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. *Youngblood*, 488 U.S. at 56-57 n.*, 109 S.Ct. at 336-337 n*.

Quite simply, the Idaho Supreme Court did exactly what the federal court in *Cooper* did. Again, at the risk of sounding like a broken record, the State is inviting this Court to reverse the state Supreme Court based upon factual findings and not the erroneous statement of the law. Therefore, the petition should be denied.

CONCLUSION

For the reason set forth above, the Petition for Writ of Certiorari to review the decision of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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